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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF TEXAS
HALL COURTHOUSE - MARSHALL DIVISION

VIRTUAL FLEET MANAGEMENT,
L.L.C.,

Plaintiff

v

LAND AIR SEA SYSTEMS, INC.,

Defendant.

CASE NO.

2:16-cv-01108-JRG

HONORABLE J. RODNEY GILSTRAP
United States District Court Judge
District Court Judge Presiding

DATE:

TIME:

CTRM: 106

LAND AIR SEA'S MOTION AND
MEMORANDUM OF POINTS & AUTHORITIES
IN SUPPORT OF RELIEF UNDER RULE 60[B]

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1 I. RELIEF SOUGHT

2 On September 21, 2017, this Honorable Court dismissed Defendant's Counter
3 Claims as to Declaratory Relief on grounds of invalidity of the subject '701 Patent as
4 asserted by Plaintiff. This Honorable Court's order was, for purposes, a default
5 judgment as against Defendant.

6 Defendant hereby respectfully moves this Honorable Court, under Rule
7 60[b][1], [6] to relieve Defendant from said Order.

8 II. DEFENDANT LAND HAS GOOD CAUSE DEFENSE

9 The issue here is whether Defendant infringed upon Plaintiff's asserted '701
10 Patent. As Plaintiff has been long aware, the '701 Patent has been subject to much
11 litigation, inclusive of before the USPTO. In point of fact, as to the '701 Patent, the
12 USPTO/Patent Trial & Appeal Board stated that said '701 Patent was seen as
13 unpatentable, anticipated and obvious:

14 "We have reviewed Petitioner's analysis and supporting evidence
15 regarding the proposed ground of obviousness based on Porter and
16 Dulaney. On the record before us, we are persuaded that Petitioner has
demonstrated a reasonable likelihood that claims 1-2, 4-5, 10-14, and
17 16 of the '701 patent would have been obvious in view of Porter and
Dulaney.

18 On the record before us, we are persuaded that Petitioner has
demonstrated a reasonable likelihood that claims 6-9 and 15 of the '701
19 patent would have been obvious in view of Porter, Dulaney, and Brei.

20 On the record before us, we are persuaded that Petitioner has
demonstrated a reasonable likelihood that claim 17 of the '701 patent
21 would have been obvious in view of Porter, Dulaney, and Sadamori.

22 We have reviewed Petitioner's analysis and supporting evidence
regarding the proposed ground of anticipation based on Winkler. On the
23 record before us, we are persuaded that Petitioner has demonstrated
a reasonable likelihood that claims 1-2, 4-5, 10-14, and 16 of he '701
24 patent

25 On the record before us, we are persuaded that Petitioner has
demonstrated a reasonable likelihood that claims 1-2, 4-5, 10-14, and
26 16 of the '701 patent would have been obvious in view of Winkler and
Dulaney.

27 On the record before us, we are persuaded that Petitioner has
demonstrated a reasonable likelihood that claim 5 of the '701 patent
28 would have been obvious in view of Winkler and Brei.

1 On the record before us, we are persuaded that Petitioner has
2 demonstrated a reasonable likelihood that claims 6---9 and 15 of the
'701 patent would have been obvious in view of Winkler and Brei.

3 On the record before us, we are persuaded that Petitioner has
4 demonstrated a reasonable likelihood that claim 17 of the '701 patent
would have been obvious in view of Winkler and Sadamori."

5 PT&AB, IPR Case No. 2015-00397, IPR Order, 06/14/15 [EXHIBIT 1].

6 Moreover, US District Court records in different jurisdictions, inclusive of
7 Delaware, establish that lawsuits brought by Plaintiff or Plaintiff's predecessor in
8 interest, were dismissed - after the above USPTO proceedings. *Gillaspey*
9 *Declaration*, Requests for Judicial Notice.

10 III. PLAINTIFF'S KNOWLEDGE - NO PREJUDICE

11 The grounds/facts upon which Defendant pled its counter claims where
12 actually well known to Plaintiff for at least some two years prior to the filing of this
13 lawsuit in this Court. Additionally, claims construction was completed in the sister
14 district actions - again neither surprise to nor prejudice of Plaintiff. It is further noted
15 that the USPTO engaged in lengthy review and analysis - after significant briefing
16 and argument by Plaintiff/Plaintiff's predecessor in interest.

17 There was, and is, nothing applicable to this action - as to Plaintiff claims
18 under '701 Patent and the issue of validity - that was not already known to Plaintiff -
19 and well prior to this action, specifically including IPR Case No. 2015-00397.

20 IV. RULE 60 MET

21 *Fed.R.Civ.P.*, Rule 60(b) provides in pertinent part:

22 On Motion and just terms, the court may relieve a party or its legal
23 representative from a[n], order, or proceeding for the following reasons:

24 (6) any other reason that justifies relief.

25 This Honorable Court is required to balance between two competing
26 imperatives in evaluating a Rule 60[b] motion: (1) finality and (2) the need to render
27 just decisions on the basis of all the facts. The Court properly looks to such factors
28 as follows to shape the framework of its' consideration, amongst which are:

- (1) that (rulings/orders) should not be lightly disturbed;
- (2) that the rule should be liberally construed in order to do substantial justice;
- (3) whether—if the judgment was a default or a dismissal in which there was no consideration of the merits—the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of (orders/rulings), and there is merit in the movant’s claim or defense;
- (4) whether there are any intervening equities that would make it inequitable to grant relief; and
- (5) any other factors relevant to the justice of the (proceeding) under attack.

Edward H. Bohlin Co., Inc. v. Banning Co., Inc., 6 F.3d 350, 355-56 (5th Cir.1993).

The decision to grant or deny relief under Rule 60(b) lies within the sound discretion of the district court. *Lindy Investments III v. Shakertown 1992, Inc.*, 2010 WL 10921, *2 (5th Cir. 2010).

In its determination, the Court properly takes into consideration that the Rule “[b]y its very nature,...seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of (orders) and the ‘incessant command of the court’s conscience that justice be done in light of all the facts.’” *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) (quoting *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970)). “Rule 60(b) vests in the district courts power ‘adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.’” *Id.* (internal citations omitted).

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1. PT&AB, IPR Case No. 2015-00397, IPR Institution Decision, 06/14/15 [**EXHIBIT 1**]. The IPR, with lengthy review and analysis, opined that the '701 Patent was unpatentable, obvious and anticipated by a line of prior art patents. Again, the IPR was with respect to litigation brought by Plaintiff's predecessor in interest, Proximity Monitoring. See also, EXHIBIT 2, Mercedes' Petition for IPR (December 9, 2014), upon which the USPTO Decision was based. *Gillaspey Declaration*, Exhibits & Requests for Judicial Notice.

*	<i>Proximity v AssetWorks,</i>	2014-00575	(ded)
*	<i>Proximity v Mercedes,</i>	2014-00576	(ded)
*	<i>Proximity v Voxx Electronics,</i>	2014-00577	(ded)

*	<i>Virtual Fleet v Telogis</i>	2016-00592	(txed)
*	<i>Virtual Fleet v US Fleet</i>	2016-00647	(txed)
*	<i>Virtual Fleet v Fleetilla</i>	2016-00646	(txed)
*	<i>Virtual Fleet v Actsoft</i>	2016-01075	(txed)
*	<i>Virtual Fleet v Clever</i>	2016-01107	(txed)
*	<i>Virtual Fleet v Position</i>	2017-00014	(txed)

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1 4. A subsequent PT&AB IPR action was instituted with respect to
2 the '701 Patent in the matter of *Unified Patents, Inc. v Virtual Fleet*, IPR
3 2017-00845. Unified filed the IPR Petition based heavily on the
4 Mercedes IPR 2015-00397, inclusive of the same prior art
5 references/patent references of Porter, Winkler, Dulaney, Brei, and
6 Sadamori, the Scott Andrews Declaration, and the IPR 2014-00397
7 Institution Decision (referenced hereinabove as EXHIBIT 1 - the '701
8 Patent was unpatentable, obvious and anticipated). In that IPR '845
9 proceeding, Plaintiff Virtual Fleet did not even file a Response. Instead,
10 Plaintiff Virtual sought to *Terminate and Dismiss Before Institution*, to
11 which Petitioner Unified apparently agreed. **EXHIBITS 3, 4.** *Gillaspey*
12 *Declaration*, Exhibits submission & requests for judicial notice.

13 Defendant's assertion of invalidity of the '701 Patent has clear merit, as
14 underscored by the US Patent & Trademark Office/Patent Trial & Appeal Board. The
15 prior art/prior patent references submitted to the USPTO, including, but not limited
16 to, Porter, Winkler, Dulaney, Brei, and Sadamori establish the unequivocal merit of
17 an invalidity defense to Plaintiff's asserted '701 Patent on grounds of unpatentability
18 on grounds of obviousness and anticipation. See, **EXHIBIT 1**, IPR Decision.

19 Again - this is not news to Plaintiff, as Plaintiff has had full and actual
20 knowledge of all such facts since not later than 2014 (the December 2014 IPR filing
21 by Mercedes).

22 **No Inequities to Plaintiff Such to Preclude Relief**

23 On just the undisputable facts as set forth above, Plaintiff cannot establish that
24 it would be inequitable/prejudicial to it. There is certainly no surprise. To the
25 contrary, Plaintiff has had actual knowledge of the infirmities of the '701 Patent - and
26 the exact grounds for establishing the adverse facts of unpatentability. Moreover,
27 Plaintiff engaged in full litigation (IPR '397) on the very facts/grounds which
28 ultimately led to institution opinion of unpatentability. **EXHIBITS 1-3.**

1 V. CONCLUSION

2 Defendant unequivocally has a meritorious defense to the Plaintiff's claims,
3 as established by, *inter alia*, the US Patent & Trademark Office making
4 determination of unpatentability in the 2014 Mercedes instituted IPR proceedings.
5 The facts, prior art references, and the grounds for that ruling are well known and
6 have been well known to Plaintiff since that time.

7 A second IPR was initiated in 2017, UPI v Virtual, which followed the prior
8 Mercedes IPR filings/proceedings. Plaintiff terminated the UPI proceeding before
9 a ruling on the merits (joint motion).

10 After the US Patent Office IPR proceedings commenced in 2014, Plaintiffs
11 dismissed a series of cases, some 9 in total.

12 There can be no, and there is no, prejudice to Plaintiff in granting this motion.

13 The judicial policy of trying cases on their merits is appropriate to this matter.
14 Defendant's motion is properly granted.

15 DATED: November 27, 2017

/s/ Steele N. Gillaspey

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17 Steele N. Gillaspey,
18 Attorney for Defendant,
LAND AIR SEA SYSTEMS

19 **Certificate of Service**

20 I hereby certify that on the 28th day of November, 2017, I electronically filed the
21 Defendant's Motion for Relief Under Rule 60 with the Clerk of Court using the CM/ECF system,
which system will send notification of such filing to:

22 Joseph Pia
23 Chrystal Mancuso Smith
PIA ANDERSON
24 136 E. South Temple, 19th Flr
Salt Lake City, Utah 84111

25
26 /s/ Steele N. Gillaspey
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